SUPREME COURT
OF THE
STATE OF CONNECTICUT

SC 20466

NANCY BURTON

v.

REGINA McCARTHY ET AL.

PLAINTIFF-APPELLANT'S BRIEF

To Be Argued By:
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Statement of Issues

A. DEP violated the Clean Water Act by failing to make a legally valid Best Technology Available (BTA) Determination and by delaying the legally mandated determination to the far-and indeterminate future.

B. DEP violated the Clean Water Act by conducting a hearing on renewal of the 1992 NPDES Permit at which it took "Closed Cooling" "off the table."

C. Plaintiff established unreasonable pollution.

D. The plaintiff established that the permit proceedings were legally flawed and fundamentally unfair and a product of prejudgment; therefore the administrative appeal should be sustained and the permit vacated and nullified.

E. Plaintiff established that the DEP procedures were inadequate for the protection of the rights recognized in the Connecticut Environmental Protection Act and therefore the relief sought should be granted.

F. The trial court proceedings were inconsistent with the Supreme Court remand order

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Nature of the Proceedings and Facts of the Case

Introduction

This appeal challenges the decision of the trial court (Moukawsher, J.) issued on November 8, 2018 in which it dismissed two consolidated cases[1] challenging Connecticut Department of Environmental Protection ("DEP")[2] proceedings concerning renewal of the Clean Water Act ("CWA")[3] NPDES[4] permit it issued in 1992 for water intake and discharge operations of the Millstone nuclear power plant ("Millstone")[5] in Waterford, Connecticut.

The primary issue on appeal concerns DEP's failure to comply with the CWA by failing to identify and implement "best available technology" ("BTA") in the selection of a Millstone cooling water system in the permit renewal proceedings and deferring making

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[1] Nancy Burton v. Regina McCarthy, Commissioner, HHD-CV-07-4028617-S ("Burton v. McCarthy"), and Nancy Burton v. Department of Environmental Protection, HHD-CV-10-5036261-S ("Burton v. DEP").

[2] "DEP's" name was changed to "Department of Energy and Environmental Protection" after these actions were instituted. To avoid confusion, and maintain consistency with the record, this brief refers to the agency as "DEP."

[3] 33 U.S.C. §§1326(a) and 1326(b).

[4] The acronym stands for National Pollutant Discharge Elimination System, a term which derives from the dictate of the CWA, 33 USC §1251 (Congressional declaration of goals and policy")(1)("It is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.") At hearing before Judge Moukawsher on the consolidated cases, the hearing officer was unable to state what the acronym, NPDES, stands for. A-134-5

[5] Millstone consists of Units 1, 2 and 3 nuclear reactors. All are cooled by once-through cooling systems. Unit 1 was permanently shut down in 1995 and has not generated electricity since then; however, it continues to require the use of cooling water to cool its thousands of tons of spent fuel rods in its onsite spent fuel pool. Unit 2's federal license is scheduled to expire in 2035 and Unit 3's federal license is scheduled to expire in 2045. The U.S. Nuclear Regulatory Commission extended the original 40-year licenses by 20 years. Applications are underway by other U.S. nuclear reactor operators to obtain further 20-year license extensions. In the case of Millstone, such potential extensions could extend the operating life of Unit 2 to 2055 and Unit 3 to 3065 or even longer.

a BTA determination indefinitely. In Burton v. McCarthy, the plaintiff sought conversion of the Millstone intakes to a closed cooling system.[6]

The CWA mandates the permitting agency[7] make a determination of BTA during NPDES permitting and permit renewal proceedings. The Environmental Protection Agency ("EPA), which administers the CWA, recognizes closed cooling as the most effective system for minimizing entrainment.[8]

Yet, during the administrative proceedings on renewal of the NPDES permit, the hearing officer, in clear error and in violation of state and federal law[9] and in classic disallowed predetermination, prohibited the intervening parties from addressing the issue, either through discovery or through presentation of evidence, notwithstanding the plaintiff had raised the issue as one she intended to pursue in a §22a-19(a) notice of intervention.[10]

Moreover, DEP and the hearing officer[11] defied the order of the Connecticut Supreme Court issued in 2000 in Fish Unlimited v. Northeast Utilities, 254 Conn. 1

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[6] Burton v. McCarthy Complaint, Prayer for Relief, A-13.

[7] DEP is the Environmental Protection Agency's designated state agency authorized to regulate the NPDES program. GET CITE.

[8] The EPA has recognized that closed-cycle cooling is the most effective system for minimizing entrainment. 79 Fed. Reg. at 48,342.

[9] Clean Water Act, 33 U.S.C. §1326(b), Conn. Gen. Stat. §22a-430.

[10] Plaintiff intervened in the DEP 2009 renewal proceedings by filing a Notice of Intervention. A-89. Paragraph 5F states: "The application violates the federal Clean Water Act in that it fails to implement best available technology to avoid unnecessary adverse impacts and in other respects." The hearing officer precluded plaintiff from pursuing this issue at the hearing. Ruling on Notice of Intervention, A-94.

[11] In testimony before Judge Moukawsher in the consolidated proceedings on October 1, 2018, Janice Deshais, the hearing officer, acknowledged she did not apply Fish Unlimited to the adjudicatory proceedings over which she presided, deeming the decision "irrelevant" to the proceeding. A-136.

(2000) ("Fish Unlimited"), in which Justice Katz set the legal stage for the future permit renewal proceedings:

> Before renewing the defendants' permit, the department **must** review all of its prior determinations that the defendants' cooling system is consistent with the provisions of the federal Clean Water Act, which requires that the cooling water intake structure represent "the best available technology for minimizing environmental impacts." See U.S.C. §1326(b). Thus, the department will evaluate the environmental problems associated with the use of a once-through cooling water system. The department also will determine whether these problems warrant the conversion of unit 2 to a closed cooling water system and whether the installation of a fish return system is needed. [Emphasis added.]

Defying the Supreme Court's Fish Unlimited ruling, at the adjudicatory hearing on NPDES permit renewal which eventually ensued in 2009, the hearing officer precluded plaintiff from introducing into evidence the most recently expired 1992 permit[12] and hence consideration of its BTA determination. DEP and Dominion vociferously opposed plaintiff's offer of the 1992 permit.[13]

In further defiance of the 2000 Fish Unlimited ruling, DEP did not determine whether the "environmental problems associated with once-through cooling water system . . . warrant[ed] conversion to a closed cooling system" but deferred making such a determination until an unstated time in the future, perhaps even decades from now.

In further defiance of the Supreme Court's Fish Unlimited ruling, the hearing officer precluded plaintiff from introducing into evidence DEP's Draft BTA determination dated

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[12] Under the CWA, an NPDES permit may be issued for a maximum five-year term. In this case, the December 14, 1992 permit expired on December 13, 1997. However, by application of Conn. Gen. Stat. §TK, DEP allowed the 1992 permit to remain in effect for 18 years, along with continuously renewed emergency authorizations, when DEP issued a renewed permit. See further discussion at TK *infra*.

[13] Maintaining consistency, DEP and Dominion objected to each and every one of plaintiff's offers of documentary evidence and the hearing officer sustained their objections.

September 10, 2007 which determined that BTA for Millstone was a **closed cooling system**.

DEP withdrew its September 10, 2007 draft BTA requiring Millstone conversion to closed cooling in the course of secret negotiations between DEP and Dominion which first came to public light during the 2009 permit renewal hearing. The hearing officer disallowed discovery by intervenors into the facts and circumstances leading to DEP's withdrawal of the September 10, 2007 draft BTA finding of closed cooling.

The trial court commenced a hearing on the consolidated cases, Burton v. McCarthy, an action brought pursuant to Conn. Gen. Stat. §22a-20, and Burton v. DEP, an administrative appeal from DEP's decision to renew the NPDES permit, on October 1, 2018 pursuant to the Supreme Court remand order.

The remand order directed the trial court to conduct a two-step proceeding: first, to determine whether DEP's procedures were inadequate to protect the rights governed by CEPA and, second, conduct further proceedings to determine what relief is appropriate.

However, the trial court disregarded the remand order and conducted a one-step proceeding without first determining whether the standard of §22a-20 ("whether DEP's procedures were inadequate for the rights protected by the Environmental Protection Act ") had been met. Plaintiff filed a motion for mistrial requesting a two-step proceeding in accordance with the remand order. The motion was denied. The trial court dispensed with briefs, issuing its Memorandum of Decision[14] on November 8, 2018, dismissing both cases.

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[14] A-20.

The decision on appeal concludes *inter alia* that DEP acted lawfully and was justified under CEPA and CWA to allow Millstone to continue once-through cooling into the indefinite future without making a BTA on whether a closed cooling system is best available technology at Millstone as required by the CWA. The Decision is facile, superficial and prone to error, as set forth in detail below. Plaintiff identified numerous errors[15] and brought them to attention of the trial court in her Corrected Motion for Reargument,[16] The trial court denied the motion on December 4, 2018 without comment and did not correct the Decision. The Decision frequently interjects strange, unwarranted, disparaging and objectionable references to plaintiff which the trial court would not have directed to a male member of the bar.

This brief argues that the trial court decision displayed a cavalier disregard for the governing law and facts of the case and was replete with factual and legal error, chief of which was its conclusion that DEP lawfully excluded consideration of CCC as BTA from

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[15] *Inter alia*, the Decision does not reference plaintiff's Notice of Intervention, Fish Unlimited, nor Conn. Gen. Stat. §22a-18, the statutory underpinning of Burton v. McCarthy and the central subject of the Supreme Court remand order. The Decision is replete with the incorrect assumption that the adjudicatory standard applied by DEP – central to its decisionmaking – was a cost-benefit analysis, when there is no evidence in the record that it did so and clear evidence to the contrary, namely, DEP's own statements.[15] The Decision devotes numerous pages to a discussion of documentary evidence and scientific studies prepared by DEP fisheries experts over the years raising alarms about the Millstone intakes devastating effect on fisheries populations oblivious to the fact that the hearing officer sustained DEP and Dominion objections to these proposed plaintiff's exhibits and thus they were not even considered at the hearing. The Decision credits DEP for requiring refueling outages during the annual springtime larval fish migration and peak period of entrainment. This is not the case. Dominion may under the new permit schedule refueling outages other than during the spring.

[16] A-69. Pages 10-12; Decision A-20 at pages 9-12.

the outset and could lawfully defer making a BTA determination indefinitely.[17] In the Argumemt *infra*, plaintiff sets forth how the decision commits reversible error.

This Brief concludes that the trial court committed reversible error in both Burton v. McCarthy and Burton v. DEP, that this appeal should be sustained, and the NPDES permit issued be revoked pending further order and proceedings of the court.

Closed Cycle Cooling

Millstone has utilized a "once-through" cooling system since its first nuclear reactor went online in 1970. That system withdraws some 2.75 billion gallons of water per day from Niantic Bay, an estuary of the Long Island Sound. Heated water,[18] laced with radioactive materials and toxic and other chemicals,[19] is discharged from the plant into

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[17] As of this writing, the renewed permit issued on September 1, 2010 expired four years ago and has not been renewed.

[18] Hot water has become a chronic issue for Millstone recently. In 2014, Unit 2 had to shut for 11 days because the temperature of the incoming water exceeded 75 degrees. Its federal license required shutdown if the temperature of incoming water exceeded 75 degrees. It was the first shutdown of a nuclear power plant anywhere in the world relying on open seawater to be forced closed due to rising seawater temperatures. Dominion applied for an emergency license amendment to increase the limit to 80 degrees. The NRC granted the request without a hearing. DEP does not independently monitor the temperature of Millstone water discharges, claiming it lacks the budget to do so.

[19] Effluent discharges, which are regulated by EPA, would be virtually eliminated if Millstone employed a closed cooling system. The record notes that, following disclosures by a Millstone whistleblower, James Plumb, who was fired over his whistleblowing, criminal and civil actions were brought against Millstone's owners for deliberate falsification of monitoring records under the 1992 permit. Fact Sheet accompanying Renewed Permit, page 6. ("2010 NPDES permit:

"After submission of the renewal application, DEP became aware of several serious compliance issues at [Millstone], related primarily to unauthorized discharges of hydrazine, a carcinogen, and improper monitoring. [E.g., technicians were directed by their superiors to turn off valves to hold back hydrazine discharges during monitoring required under the 1992 NPDES permit.] This led to both civil and criminal enforcement proceedings by both state and federal regulatory agencies against Dominion's predecessor, Northeast Utilities. [After Dominion acquired Millstone it elevated Plumb's

the Long Island Sound. It is estimated that Millstone's once-through cooling system destroyed more than 29 billion fish eggs, larvae and fish, including 1.5 billion indigenous Niantic River winter flounder, between 1997 and 2002[20]

A closed cycle cooling system ("CCC") would reduce the water usage by 98 per cent, with a proportionate reduction in loss of marinelife through impingement and entrainment.[21] It would also virtually eliminate the discharge of radioactive and toxic discharges[22] to the Long Island Sound as well as the thermal plume which contributes to heating of the waters of the Sound.[23]

In her Notice of Intervention,[24] plaintiff alleged:

> 5J. The application should be denied because of past brazen violations of permit conditions and a plea of guilty to committing federal felonies by wilfully filing falsified environmental monitoring reports and releasing hydrazine and other carcinogens in violation of the permit.
> 5K. The application should be denied because of the applicant's track record of firing whistleblowers in retaliation for their truth-telling and exposure of illegal operating conditions at the Millstone Nuclear Power Station.

The hearing officer precluded plaintiff from presenting such issues at the administrative hearing.[25]

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superior to head the chemistry department.] These actions were not fully concluded until early 2000 and resulted in the imposition of significant penalties and other sanctions.

[20] See Soundkeeper Comments on Revised Draft NPDES Permit for Millstone Power Station, Docket Exhibit 110 at pages 3-4 (January 28, 2008)
[21] Entergy v. Riverkeeper, 556 U.S. 208 (2009).
[22] The renewal application does not quantify either toxic chemicals, heavy metals, radioactive waste and other pollutants discharged to the Sound as liquid waste, nor are the quantities identified nor limited by the permit.
[23] Forty per cent (42 out of 104 units) of U.S. nuclear power plants operate with closed cooling systems. The Palisades nuclear plant in Michigan was originally built with once-through cooling and later converted to closed cooling. New York State has determined that closed cycle cooling is BTA for Indian Point Units 2 and 3 on the Hudson River. Many other retrofits have been mandated. See Soundkeeper "Comments on Revised Draft Permit," Administrative Record 110, Full Exhibit 62, pages 5-6.
[24] A-89.

Studies undertaken by Millstone's owners in 1993[26] and 2001[27] established the feasibility of converting the Millstone reactors to CCC.[28] The 1993 study estimated the cost for a cooling tower for all three units[29] would be $88 million.[30] The Environmental Protection Agency ("EPA") in other cases has ordered nuclear and other power plants to convert to CCC to minimize adverse environmental impacts. See footnote 23.

1992 Permit

On December 14, 1992, the Connecticut Department of Environmental Protection ("DEP") issued a renewed CWA permit[31] to the owners and operators of Millstone which set maximum limits on the amount of water which could be withdrawn continuously from Niantic Bay (an estuary of the Long Island Sound); maximum limits on the temperature of the thermal plume discharged continuously into the Long Island Sound; and certain limits on chemical discharges to the Long Island Sound (none quantified but stated in terms of concentrations). Many of these chemicals are used to "treat" radiological

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[25] "Ruling on Notice of Intervention" December 20, 2006, A-94.
[26] "Feasibility Study of Cooling Water System Alternatives to Reduce Winter Flounder Entrainment at Millstone Units 1, 2 a& 3" (DEP-44)
[27] "Millstone Power Station: An Evaluation of Cooling Water System Alternatives" (DEP-5)("Natural and mechanical draft cooling towers may be technically feasible based on the preliminary engineering analyses completed for this report.")(page ES-3 et seq.)
[28] "A cooling tower option would reduce cooling water demand and larval entrainment [by more than 90 per cent] without posing insurmountable difficulties" "Feasibility Study, DEP-44, pages ES3;
[29] Although Millstone Unit 1 permanently shut down in 1998, it still utilizes the once-through cooling system to cool the thousands of tons of still-highly-radioactive spent fuel rods kept in an elevated pool of water near the reactor.
[30] "Feasibility Study," DEP-44 at ES 3.
[31] A-128.

byproducts in the discharge streams.[32] Monitoring by Dominion of radiological releases to the Sound is also required by the permit.

The 1992 permit declares the once-through cooling system "the best available technology."[33] The permit further states:

> The Commissioner has also determined that additional evidence based upon actual operating experience of Millstone Power Station Units 1, 2 and 3 would be desirable in order to corroborate the Commissioner's findings. Such data will be generated by the studies to be conducted pursuant to paragraphs 5[34] and 8[35] of this permit.
> **The Permittee should take cognizance of the fact that additional evidence may result in the imposition of more stringent requirements and the potential utilization of a cooling system other than the one utilized. Accordingly, the company should take this potential into consideration in their design wherever feasible.** [Emphasis added.]

By its terms and under the CWA, the permit was issued for a maximum five-year term and expired on December 12, 1997.Thereafter, for the ensuing twelve (12) years, in lieu of convening proceedings on NU's application to renew the permit and undergo public review, DEP accepted, approved and renewed a series of "emergency authorizations" at NU's request which relaxed certain NPDES requirements in the 1992 permit and allowed *inter alia* greater use of the chemical hydrazine, a carcinogen, and

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[32] Although the federal government has largely pre-empted regulation of the radiological aspects of nuclear power plant operations, the Environmental Protection Administration exercises jurisdiction of the treatment of nuclear waste in discharges by regulating the chemicals in the treatment process.

[33] A-129.

[34] Paragraph 5 provides: "The permittee shall conduct or continue to conduct biological studies of the supplying and receiving waters, entrainment studies, and intake impingement monitoring. The studies shall include studies of intertidal and subtidal benthic communities, finfish communities and entrained plankton and shall include detailed studies of lobster populations and winter flounder populations."

[35] Paragraph 8 provides: "On or before January 31, 1993 submit for the review and approval of the Commissioner a report on alternatives t reduce entrainment of winter flounder larvae in accordance with "Scope of Work for Cooling Water Alternatives Feasibility Study to Reduce Larval Winter Flounder Entrainment, May 1992."

allowed water intake volumes to increase. Because the CWA requires the opportunity for public hearing on substantive modifications of an NPDES permit such as these, issuance of the EAs was a continuous and deliberate 12-year violation of the CWA Act.

On December 20, 1999, seven months following the Supreme Court decision in Fish Unlimited, then-DEP Commissioner Arthur J. Rocque signed his name to a DEP "Transmittal Slip"[36] by which he approved a "renewal" of a previously issued "emergency authorization" for continuance of a "previously authorized activity" at Millstone Unit 3. He hand-wrote this comment at the bottom of the transmittal slip:

> I really hate these. Statutes are very limited in what the[y] define as "emergency." Continuing emergency is **not** even contemplated. [Emphasis in original]

Prior to transfer of the 1992 permit from Northeast Utilities to new owner Dominion Nuclear Connecticut, Inc. ("Dominion") in 2001, DEP combined the existing EAs to one on November 13, 2000. It remained in effect for ten years, until the new permit was issued on September 1, 2010.[37]

Fish Unlimited

Twenty years ago, on April 20, 1999, Fish Unlimited[38] sought a court order to convert Millstone to closed cooling and in the meantime be required to schedule refueling shutdowns in the spring to protect the migrating fish larvae from entrainment and impingement during their peak migration period. The trial court issued a temporary

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[36] A-14 and trial court Exhibit TK. Judge Moukawsher accepted this as a full plaintiff's exhibit for purposes of the hearing; the hearing officer had sustained DEP and Dominion objections to its admissibility during the administrative proceedings.
[37] See "Fact Sheet", page 6, attached to Second Tentative Determination.
[38] Fish Unlimited, a fisheries conservation organization, was joined by other environmental groups as plaintiffs. The plaintiff herein represented the Fish Unlimited plaintiffs as their attorney.

restraining order[39] which delayed Millstone Unit 2 restart by ten days.[40] The case was dismissed on grounds of failure to exhaust administrative remedies: plaintiffs were directed to pursue their quest for a closed cooling system through Clean Water Act NPDES proceedings which had not yet begun and would not commence until 2009.[41]

On appeal to the Supreme Court in Fish Unlimited, Justice Katz set the legal stage for the future permit renewal proceedings:

> Before renewing the defendants' permit, the department **must** review all of its prior determinations that the defendants' cooling system is consistent with the provisions of the federal Clean Water Act, which requires that the cooling water intake structure represent "the best available technology for minimizing environmental impacts." See U.S.C. §1326(b). Thus, the department will evaluate the environmental problems associated with the use of a once-through cooling water system. The department also will determine whether these problems warrant the conversion of unit 2 to a closed cooling water system and whether the installation of a fish return system is needed.[42] [Emphasis added.]

Once the administrative proceedings began, the plaintiff intervened on November 9, 2006 pursuant to Conn. Gen. Stat. §22a-19(a).[43] The hearing officer assigned to the hearing issued a ruling precluding plaintiff from addressing *inter alia* closed cooling as BTA and toxic and radioactive waste discharges.

On March 2, 2007, plaintiff instituted Nancy Burton v. Regina McCarthy, HHD-CV-07-4028617-S, in which she sought relief pursuant to Conn. Gen. Stat. §22a-20. Defendants DEP and Dominion twice moved to dismiss the case; each time the trial

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[39] A-15.
[40] The U.S. Nuclear Regulatory Commission had ordered the three Millstone nuclear reactors shut and the entire station put on its "watch list" in 1998 when whistleblowers disclosed an unnerving array of pervasive license violations.
[41] In Waterbury v. Washington, the Supreme Court expressly overruled Fish Unlimited in part, ruling that in a 22a-16 injunction action, a party need not exhaust administrative remedies.
[42] Fish Unlimited at TK.
[43] See Notice of Intervention, A-89.

court dismissed the case; plaintiff appealed to the Appellate Court; the Supreme Court remanded the appeal to itself and ultimately reversed each dismissal, remanding the case to the trial court.[44]

DEP's First Notice of Tentative Determination and Notice of Hearing

In August 28, 2006, DEP issued Notice of Tentative Determination to renew the Millstone NPDES permit, together with a draft permit.

Plaintiff submitted a petition with sufficient signatures to mandate a public hearing on the application. Prehearing proceedings commenced on October 19, 2006.

In June 2007, the hearing officer approved a request by DEP to suspend the proceedings so it could evaluate the impact if any on the proposed draft permit of Riverkeeper, Inc. v. Environmental Protection Agency, 475 F.3d 83 (2d Cir. 2007),[45] which had been released on January 25, 2007. The State of Connecticut through its Office of the Attorney General had intervened in Riverkeeper to advocate for national rules mandating closed cooling systems for large facilities such as Millstone. The hearing officer directed that the suspension would remain in effect until DEP issued a Second Notice of Tentative Determination and thereafter she would set a schedule for the impending proceedings.[46]

Plaintiff's Notice of Intervention

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[44] See Burton v. McCarthy, 291 Conn. 789 (2009); Burton v. McCarthy, 323 Conn. 668 (2016).

[45] Riverkeeper was reversed in part on appeal to the Supreme Court. Entergy Corp. v. Riverkeeper, Inc., 556 U.S.208 (2009). Entergy determined that the Second Circuit had erred in rejecting EPA's use of cost-benefit analysis in formulating rules for implementation of the BTA standard. Nevertheless, in this case, DEP issued its BTA determination set forth in the reissued permit, not based on a cost-benefit analysis, but one referred to as "Best Professional Judgment on a case-by case" standard. See discussion above at TK.

[46] "Second Notice of Tentative Determination," Docket No. 104, page 2

On November 9, 2006, plaintiff filed a Notice of Intervention pursuant to Conn. Gen. Stat.[47] On December 20, 2006, the hearing officer issued a ruling[48] specifically excluding from the proceeding the allegations listed in Paragraph 5 subparts B, C, D, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T and U.

Thus, the hearing officer precluded plaintiff from presenting evidence in support of paragraph 5F which alleges as follows:

> The application violates the federal Clean Water Act in that it fails to implement best available technology to avoid unnecessary adverse impacts and in other respects.

Thus, the hearing officer precluded plaintiff from presenting evidence in support of Paragraph 5B, which alleges as follows:

> The application proposes to release toxic and radioactive substances into the Long Island Sound and the shoreline and public beaches of the state, all of which are public natural resources and thereby cause their contamination and destruction of marinelife habitat and thereby endangering human health and habitat all of which is unnecessary.

On December 22, 2006, plaintiff moved for reconsideration of the ruling, which was denied.

Nancy Burton v. Regina McCarthy, Commissioner et al.

On March 2, 2007, plaintiff instituted Burton v. McCarthy seeking relief pursuant to Conn. Gen. Stat. §22a-20.[49]

The procedural history of the case includes two dismissals, and reversals of the dismissals, with orders of remand issued by the Supreme Court.[50]

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[47] Notice of Intervention, Docket File 18, A-89.
[48] Ruling on Notice of Intervention, Docket File 41, A-94.
[49] Complaint at A-7.
[50] Once this action seeking declaratory and injunctive relief was commenced by summons and complaint dated March 2, 2007 and duly served upon the defendants and

September 10, 2007 Draft BTA Determination

Having reviewed the Riverkeeper decision,[51] DEP prepared a new draft BTA Determination dated September 10, 2007 in which **it concluded that closed cooling was BTA for Millstone.**[52]

The draft BTA determination states in pertinent part as follows:

> (J) Pursuant to Section 316(b) of the federal Water Pollution Control Act 33 USC §1326(b) and Conn. Gen. Stat. §22a-430(a), the location, design, construction and capacity of the cooling water intake structures for Units 2 and 3 at the Millstone Power Station (MPS) shall reflect the Best Technology Available (BTA) for minimizing adverse environmental impacts. Based upon the information provided with the Permittee's application the Commissioner has made a case-by-case determination using Best Professional Judgment that the BTA for Unit 2 and Unit 3 at MPS shall be at a minimum the performance standards that can be achieved for minimizing impingement mortality and entrainment when cooling water intakes are reduced with the implementation of a closed cycle recirculating system. Such closed cycle recirculating system or an alternative technological

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returned to the Superior Court, defendants moved to dismiss the case; the motion to dismiss was granted by the court (Tanzer, J.) on May 15, 2007; plaintiff appealed dismissal to the Appellate Court on July 16, 2007; thereafter the defendants moved to consolidate this case with the case of Nancy Burton v. Department of Environmental Protection, HHD-CV-10-5036261-S, which motion was granted by the court (Robaina, J.) on May 22, 2012; thereafter the Supreme Court transferred the case to itself and, after argument, reversed the judgment of dismissal and remanded the case to the Superior Court; thereafter defendants again moved to dismiss the case; the motion was granted by the court (Sheridan, J. on October 24, 2014); thereafter plaintiff appealed the dismissal to the Appellate Court on December 22, 2014; the Supreme Court transferred the case to itself on April 11, 2016 and, after argument, reversed the judgment of dismissal and remanded the case to the Superior Court; thereafter the court (Moukawsher) commenced hearing on the consolidated cases on October 1, 2018 and, at the conclusion of which plaintiff filed a Request for Finding of Facts on October 29, 2018 (A-62); thereafter by Memorandum of Decision dated November 8, 2018 the trial court ordered the case dismissed.

[51] In Riverkeeper, the Second Circuit Court of Appeals determined that closed cycle cooling was most protective of the marine environment and that state agencies issuing NPDES permits should not engage in cost-benefit analysis. The latter conclusion was reversed by the U.S. Supreme Court in Entergy v. Riverkeeper, *supra*.

[52] Docket No. 110, Soundkeeper Comments on Revised Draft NPDES Permit, dated January 28, 2008, addressed to Charles Nezianya (DEP), Attachment A, as referenced in said Comments at page 11, footnote 6, pages 21-22, BC-B.

and operational measure individually or in combination (alternative measure) shall be capable of limiting the cumulative maximum daily intake flow for Units 2 and 3at MPS to not more than 219 million gallons per day (mgpd) or achieving a performance standard of ninety per cent (90%) or greater from the baseline calculation derived pursuant to paragraphs (Q) to (R) inclusive below. . . .

Among the requirements set forth in the Draft September 10, 2007 BTA are provisions are set forth as follows:

(I) On or before June 1, 2008 the Permittee shall submit a proposed scope of study and schedule for evaluating and implementing the feasibility of all technological and operational measures necessary for the implementation and operation of a closed cycle recirculating system for Unit 2 and for Unit 3 at MPS and alternative measures that are capable of limiting daily intake flow to 219 mgpd or achieving a performance standard of ninety per cent (90%) or greater in reduction in impingement mortality and entrainment from the below baseline calculation derived pursuant to paragraphs (Q) or (R) inclusive below at MPS. Such scope of study shall at a minimum include the following:

Although the document was prepared by DEP, and a copy attached to a filing in the NPDES renewal proceedings by CFE/Soundkeeper[53] both DEP and Dominion vigorously objected to plaintiff's efforts to offer it into evidence at the hearing and the hearing officer rejected it as an exhibit. The September 10, 2007 draft BTA Determination does not appear anywhere in DEP nor Dominion filings and is not referenced in the Proposed Final Decision nor Final Decision.

The 6-page Draft September 10, 2007 BTA Determination was prepared by DEP and provided to Dominion in advance of DEP's issuance of its Second Tentative Determination.[54]

After DEP privately circulated the draft BTA Determination of September 10, 2007, to Dominion and Soundkeeper counsel, DEP and Dominion engaged in private

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[53] Soundkeeper "Comments on Revised Draft NPDES Permit" (January 28, 2008),B/C B.

[54] See footnote 69, Soundkeeper Comments at page 11, footnote 6

discussions. As Dominion's representative testified at the administrative hearing,[55] on behalf of Dominion she demanded that a prospective permit requirement of closed cooling – as set forth in the September 10, 2007 Draft BTA Determination - was "off the table."[56] From this moment on, closed cycle cooling at Millstone was officially "off the table"; thereafter, DEP issued its Second Tentative [BTA] Determination deferring a BTA determination on closed cooling to a time in the indefinite future.

DEP's Second Tentative [BTA] Determination and Notice of Hearing

On December 14, 2007, following issuance of the decision in Riverkeeper, DEP issued its Second Tentative [BTA] Determination and Notice of Hearing, together with a revised draft permit.[57]

These documents were the centerpiece of the DEP hearing on the NPDES permit renewal.

DEP Hearing on Millstone NPDES Permit Renewal Application

DEP commenced the hearing on the permit renewal application in 2009 and ultimately renewed the permit on September 1, 2010 for a five-year term which expired four years ago on August 31, 2015. Despite the passage of 20 years since Fish Unlimited was instituted seeking Millstone conversion to closed cooling, DEP declined to decide whether to issue an order converting Millstone to a closed cooling system and deferred a determination on CCC to the indefinite future.[58] The decision allows Millstone to continue to operate its once-through cooling system indefinitely with the addition of

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[55] See Transcript of administrative hearing excerpts, A-TK.
[56] See Testimony of Dominion witness Cathy Taylor, Administrative Hearing, Transcript, Volume III, January 8, 2009 at pages 443, 444, 457 (A-108 *et seq.*)
[57] Docket File 104.
[58] See Final Decision.

various flow-limiting technologies which fall far short of a closed cooling system in their ability to radically reduce entrainment.

Initially, the parties to the administrative proceedings on NPDES permit renewal, in addition to DEP, Dominion Nuclear Connecticut, Inc. ("Dominion")[59] and the plaintiff, were intervenors Connecticut Fund for the Environment ("CFE") and Soundkeeper, both 501(c)(3) environmental organizations. Through counsel, they filed detailed memoranda largely directed to the issue of converting the Millstone intakes to CCC, a step which they strongly advocated. They referenced the draft BTA dated September 10, 2007. Subsequently at hearing, plaintiff offered this document into evidence to establish that DEP had decided that DEP had determined that closed cooling conversion was BTA for Millstone. DEP strenuously objected to receipt of the document in evidence, and the hearing officer excluded it from evidence.

In excluding it, the hearing officer and DEP defied the dictate of the Supreme Court in Fish Unlimited that "Before renewing the defendants' permit, the department must review all of its prior determinations that the defendants' cooling system is consistent with the provisions of the federal Clean Water Act . . ."

Apparently frustrated that the hearing officer stood firmly opposed to allowing the hearing to consider closed cooling inversion as BTA for Millstone ("This is not the forum in which a subsequent BTA determination will be made.") CFE and Soundkeeper virtually withdrew from the case with the filing of a stipulation.

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[59] Dominion succeeded Northeast Utilities as NPDES permit renewal applicant after acquiring Millstone in at an auction conducted by the then-Department of Public Utility Control and whose terms were largely kept hidden from the public. At the time, Dominion Nuclear Connecticut, Inc.,the corporate applicant, listed its sole asset as a post office box in Niantic, Connecticut.

. The stipulation was attached to and references a "Draft Permit" which makes no determination on whether closed cooling is BTA for Millstone. These two documents were to determine the course of the hearing, as the hearing officer disallowed any evidence that challenged the permit attached to the stipulation. Ultimately, DEP approved the Draft Permit and issued a renewed five-year NPDES permit on September 1, 2010.

Plaintiff appealed the decision to the Superior Court, Nancy Burton v. Department of Environmental Protection, HHD-CV-105036261-S.

Trial Court Proceedings on Burton v. McCarthy and Burton v. DEP

Following the second Supreme Court remand of Burton v. McCarthy, the defendants moved to consolidate Burton v. McCarthy and Burton v. DEP; the motion was granted.

The consolidated cases were assigned to Hon. Thomas Moukawsher, who convened a hearing on October 1, 2018 pursuant to the second Supreme Court remand order, which directed as follows:

Footnote 7

> **The only relief that is now available to the plaintiff is a determination by the trial court as to whether the permit renewal proceeding was inadequate because the department misinterpreted or misapplied the applicable environmental law and, if the hearing is determined to have been inadequate, an order of appropriate declaratory or equitable relief.** To the extent that the plaintiff continues to believe that the hearing officer was biased and the department prejudged the proceeding, any such claims relating to procedural irregularities are relevant only insofar as they purport to provide an explanation for why the defendant issued a permit for activities that, according to the plaintiff, do not comply with the substantive law. Procedural irregularities would not provide the basis for a stand-alone claim.[60] [Emphasis added]

[60] Burton v. McCarthy, *Id.* at footnote 7.

Judge Moukawsher conducted a hearing on the consolidated cases commencing on October 1, 2018. He determined to conduct the hearing as a one-step proceeding, whereas plaintiff believed the Supreme Court remand order directed a two-step hearing: the first step to determine whether (a) the DEP proceeding was inadequate because it misinterpreted or misapplied applicable environmental law and, if so, (b) a second step to address appropriate declaratory or equitable relief. Plaintiff moved for mistrial on this issue, which was denied. The one-step hearing proceeded with both cases at the same time. The trial court never ruled on the specific question of whether the DEP proceedings were inadequate pursuant to §22a-20 and, indeed, does not reference §22a-20 in the Decision.

At the conclusion of the hearing, plaintiff submitted her Proposed Findings and Order[61] requesting a finding that DEP violated the CWA and Connecticut law by failing to issue a BTA determination on closed cooling and requesting that the administrative appeal be sustained and the NPDES permit revoked. The trial court dispensed with post-hearing briefing. On November 8, 2018, the trial court released its Memorandum of Decision dismissing both cases. Plaintiff moved for reargument, which was denied. This appeal to the Appellate Court ensued.

Memorandum of Decision

The decision concludes *inter alia* that DEP acted lawfully and was justified under CEPA and CWA to allow Millstone to continue once-through cooling into the indefinite future and to not require it to schedule refueling outages in the spring[62] during the peak

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[61] A-62

[62] Ironically, during the duration of the hearing in the month of October and thereafter, Millstone Unit 2 was shut down for a scheduled refueling outage; the timing of the

larval migration to minimize entrainment and impingement of massive numbers of marinelife.

Inter alia, the Decision does not reference plaintiff's Notice of Intervention, Fish Unlimited, nor Conn. Genn. Stat. §22a-20, the statutory underpinning of Burton v. McCarthy and the central subject of the Supreme Court remand order. The Decision is replete with the incorrect assumption that the adjudicatory standard applied by DEP – central to its decisionmaking – was a cost-benefit analysis, when there is no evidence in the record that it did so and clear evidence to the contrary, namely, DEP's own statements.[63] The Decision devotes numerous pages to a discussion of documentary evidence and scientific studies prepared by DEP fisheries experts over the years raising alarms about the Millstone intakes devastating effect on fisheries populations – with evidence plaintiff presented – oblivious to the fact that the hearing officer sustained DEP and Dominion objections to these exhibits and thus they were not even considered at the hearing. Plaintiff brought these and other such blatant errors to the attention of the trial court in her Corrected Motion for Reargument,[64] The trial court denied the motion on December 4, 2018 without comment and did not correct the Decision.

This brief will argue that the trial court decision displayed a cavalier disregard for the governing law and facts of the case. was replete with factual and legal error but above

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refueling outage assured the unit would be in operation during the 2019 spring peak larvae migration period. Nothing in the renewed permit prevents such recurrence in the future, contrary to the trial court's determination.

[63] [63] Although DEP used a cost-benefit analysis in issuing a first draft permit and tentative determination in August 2006, following release of Riverkeeper, DEP issued a second notice of tentative determination and a revised draft permit ("Revised Draft Permit") in December 2007, abandoning a cost-benefit analysis with the standard "Best Professional Judgment" to determine BTA. See "Ruling on Reconsideration," Administrative Record 170, pages 2-3.

[64] A-69. Pages 10-12; Decision A-20 at pages 9-12.

all take issue with its conclusion that DEP lawfully excluded consideration of CCC as BTA from the outset and could lawfully defer making a BTA determination indefinitely.[65] In the Argumemt *infra*, plaintiff sets forth how the decision commits reversible error.

Standard of Review

Where an appeal presents issues of statutory construction, the reviewing court's review is plenary. Burnell v. Chorches, 173 Conn. App. 788, 164 A.3d 806 (2017). This appeal presents issues of first-impression construction of provisions of the Connecticut Environmental Protection Act. Therefore, the applicable standard of review is plenary.

Factual Errors and Omissions[66]

A. The Decision asserts that EPA has allowed the Clean Water Act to become "diluted" since its enactment in 1972.[67]

This assertion is incorrect. The CWA retains its seminal language mandating BTA for cooling water structures ("Any standard established pursuant to section 1311 of this title or section 1316 of this title and applicable to a point source shall require that the location, design, construction and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.") 33 U.S.C. §1326(b).

Although the comments reference Entergy v. Riverkeeper, a decision which upheld EPA rule-making which did not mandate closed cycle cooling for major facilities and which allowed cost-benefit analysis by permit writers, the Decision neglects to note that

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[65] As of this writing, the renewed permit issued in2010 expired four years ago and has not been renewed.

[66] "Factual Errors" are addressed herein in the order presented in the Memorandum of Decision.

[67] See Decision at 2, A-TK.

the CWA Act never mandated closed cycle cooling as a national standard. On a case-by-case basis, EPA and state permit writers have mandated closed cooling, including a retrofitted CCC system at the then-Dominion-owned Brayton Point electric generating facility on the Narragansett Bay in Rhode Island. And see footnote 23.

B. The DEP did not engage in a cost-benefit analysis to arrive at the BTA.

The Decision consistently refers to and bases its decision-making on its misunderstanding that DEP employed "cost-benefit analysis" as though that approach had been the foundation of the DEP Final Decision.[68] It is not. **DEP did not apply a cost-benefit analysis in its determination of BTA.**[69] Thus, there is no basis for the peculiar statement at pages 2-3 of the Decision that "Burton believes that DEEP applying those diluted standards to Millstone [cost-benefit analysis] betrayed the public interest in the service of money."

Similarly, there is no basis for the court's statement at page 19 of the decision as follows: :"[DEP] was encouraged by the applicable standards requiring a balancing of costs and benefits. In short, the court concludes that it was a product of applying reason to facts under the appropriate standard."

Having applied an inapplicable standard to its analysis of the case, the trial court committed reversible error.

C. The Decision Misstates the Contents of the Administrative Record

The Decision states that the hearing officer considered reports of experts in DEP's

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[68] See Decision at pages 2, 12, 13, 14, 15, 19.

[69] See "12/10/07 Revised Fact Sheet," DEP-38, page 13 ("In addition the Commissioner's new BTA determination is in section 10 of the revised draft permit. **This determination does not rely upon a cost benefit analysis**.")(Emphasis added.)

fisheries division chronicling the catastrophic decline of the indigenous Niantic River winter flounder and associating such decline largely to Millstone's once-through cooling system. In fact, plaintiff introduced many such scientific reports and communications into the record. At DEP and Dominion's insistence, the hearing officer excluded them all. The hearing officer did not take them into account at all, contrary to the Decision.

Thus, for example, the statement at page 17 of the Decision ("The prior DEEP concerns about winter flounder discussed above don't suggest Dominion dominated DEEP.") cannot be credited, nor can the other conclusions rendered by the trial court on the reports of the DEP fisheries experts. The trial court error in this regard suggests a cursory and superficial glance at the record.

D. The Decision Omits and Disregards Critical Facts

1. The Decision makes no reference to the Supreme Court decision in Fish Unlimited.
2. The Decision makes no mention of the contents of plaintiff's Notice of Intervention nor the hearing officer's ruling prohibiting plaintiff from raising issues central to the proceedings, such as closed cooling as BTA.
3. The Decision makes only cursory and dismissive mention of the critical September 10, 2007 DEP Draft BTA Determination, which would have imposed closed cycle cooling, nor does the Decision even query why DEP disavowed it. The Decision's only comment on a related matter – that of Dominion's witness, Cathy Taylor, testifying that any discussion of closed cycle cooling was "off the table" – is similarly dismissive.

4. The Decision never mentions nor analyzes 22a-20,[70] the statutory underpinning of Burton v. McCarthy.

I. Argument

A. DEP violated the Clean Water Act by failing to make a legally valid Best Technology Available (BTA) Determination and by delaying the legally mandated determination to the far and indeterminate future.

The Clean Water Act mandates that the location, design, construction and capacity of the cooling water intake structures for facilities such as Millstone reflect the Best Technology Available for minimizing adverse environmental impacts.

Rather than make a BTA determination, in this case DEP made a determination of what is **not** BTA.

In remarkably awkward language, Section K of the renewed permit[71] states:

> Pursuant to Section 316(b) of the federal Water Pollution Control Act, 33 U.S.C. §1326(b), and Conn. Gen. Stat. §22a-430(a), the location, design, construction and capacity of the Unit 2 and Unit 3 cooling water intake structures at the Millstone PowerStation ("MPS") shall reflect the Best Technology Available ("BTA") for minimizing adverse environmental impacts. The Commissioner has determined that the current location, design, construction and capacity of the Unit 2 and Unit 3 cooling water intake structures at MPS does **not** represent the best BTA technology

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[70] Conn. Gen. Stat. §22a-20 provides as follows: "Procedure supplementary to other procedures. Intervening party. Sections 22a-14 to 22a-20, inclusive, shall be supplementary to existing administrative and regulatory procedures provided by law and in any action maintained under said sections, the court may remand the parties to such procedures. Nothing in this section shall prevent the granting of interim equitable relief where required and for as long as is necessary to protect the rights recognized herein. Any person entitled to maintain an action under said sections may intervene as a party in all such procedures. **Nothing herein shall prevent the maintenance of an action, as provided in said sections, to protect the rights recognized herein, where existing administrative and regulatory procedures are found by the court to be inadequate for the protection of the rights.** At the initiation of any person entitled to maintain an action under said sections, such procedures shall be reviewable in a court of competent jurisdiction to the extent necessary to protect the rights recognized herein. In any judicial review, the court shall be bound by the provisions, standards and procedures of said sections and may order that additional evidence be taken with respect to the environmental issues involved. [Emphasis added.]

[71] A-97 at page 80 *et seq.*

for minimizing adverse environmental impacts. The Commissioner has made a determination that there have been findings that reducing cooling water intake flows through the use of close cycle recirculation systems reflect the BTA for minimizing adverse environmental impacts. The information provided with the Permittee's application identified reducing cooling water intake flows through the use of closed cycle recirculation systems as the most effective technology to minimize adverse environmental impacts.[72] This identification was based upon the technologies that exist and not an evaluation of whether any particular technology can be implemented for the Unit 2 and Unit 3 cooling water intake structures at MPS. To determine the BTA that can be implemented for the Unit 2 and Unit 3 cooling water intake structures at MPS, the Permittee shall perform an evaluation in accordance with the following: . . . [Emphasis added]

Section K goes on at pages 81-86 to describe a Scope of Study to be undertaken by Dominion which, by the very terms of the description, can extend for many years if not decades. It will not be until after Dominion completes its assignment, plus extensions which might be sought, that DEP will undertake to render a "subsequent" BTA determination which, for the first time – not counting the September 10, 2007 Draft BTA Determination - will address closed cycle conversion as BTA. Oddly enough, some of the milestone deadlines occur in the year 2008 –two years before the current permit was even issued.

Thus, the renewed NPDES permit delays infinitely DEP's compliance with CWA's mandate to determine BTA for Millstone during NPDES proceedings. The CWA does not contemplate such end-runs by regulators. Such shenanigans do not advance the goal of the CWA – to eliminate pollution – nor serve the public interest. Indeed, such conduct is a mockery of the legal process.

B. DEP violated the Clean Water Act by conducting a hearing on renewal of the 1992 NPDES Permit at which it took "Closed Cooling" "off the table."

[72] Such "information" included the 1993 "Feasibility Study" (DEP-44) which was undertaken by Northeast Utilities as required by the 1992 permit at paragraph 8. The study concludes that Millstone conversion to closed cooling is "feasible."

Apparently at Dominion's insistence, any consideration of closed cooling conversion at Millstone in the NPDES permit renewal proceedings was "off the table."[73]

This meant that DEP's September 10, 2007 "Draft BTA Determination" had to be "disappeared" from the proceedings. DEP feigned ignorance. Dominion muddled the issue. The hearing officer acted as though she was unaware of Soundkeeper's January 28, 2008 "Comments" – with the six-page September 10, 2007 Draft BTA Determination attached.[74] And while intervenors Soundkeeper and CFE sought discovery of "Documents in the Applicant's Filing Relating to DEP's September 2007 Draft BTA Determination,"[75] the hearing officer denied their request.[76] To these intervenors, the proceedings were becoming a "significant waste of time and resources."[77] By September 2008, they bailed. They signed off on a stipulation that virtually ended their participation in the proceedings, settling for inadequate protection of the environment but cutting their losses.

This fundamental flaw in the proceedings doomed the process.

First, DEP was under an order from the Connecticut Supreme Court to review all its previous BTA rulings to determine whether closed cooling conversion was called for. Fish Unlimited, Id. This would include the September 10, 2007 Draft BTA Determination.

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[73] A-108 *et seq.*

[74] See Transcript of administrative proceedings excerpt, A-108; and see "Revised Notice of Intervention of Connecticut Fund for the Environment (April 10, 2008)(Administrative Docket #138), paragraphs 13-16; and see "Comments of Connecticut Fund for the Environment/Save the Sound on Revised Draft Permit (January 28, 2008)(Administrative record B/C W).

[75] See Intervenors' Request for Reconsideration" (June 6,2008), Administrative Record 160.

[76] See Ruling on Reconsideration (September 8, 2008), Administrative record 170.

[77] See Soundkeeper "Comments on Revised Draft NPDES Permit," Administrative record B/C B.

Second, the very point of the hearing was to address the current cooling water system and its alternatives. This moment had been awaited since issuance of the 1992 permit, which forecast the prospect that "the potential utilization of a cooling system other than the one utilized" might be a requirement at permit renewal time.

When adjudicating an NPDES permit application, a hearing officer acts not as a reviewing court but as a decisionmaker with full authority to set policy for the agency and **to determine what terms and conditions a permit should contain.**

EPA's Environmental Appeals Board (EAB) has stated:

> In a conventional NPDES proceeding, the hearing ordinarily serves as a forum for interested persons including the permit applicant to contest the terms and conditions of the permit. In such a proceeding the presiding officer is expected to make and in fact does make independent or de novo determinations regarding the terms and conditions of the permit based upon the evidence adduced at the hearing. He is directed by the procedural rules to conduct a fair and impartial hearing to admit all relevant and material evidence to review and evaluate the record and to issue an initial decision. See generally 40 CFR §§ 24.85 and 89 (1980). By virtue of this authority, it is clear that the presiding officer is also expected to decide any factual or legal issues which are properly raised in the course of the hearing including of course the ultimate issue of whether a permit should be issued or denied and if it is to be issued upon what terms and conditions. Moreover, although the rules do not expressly provide that the presiding officer is authorized to decide policy issues arising in the course of the hearing such authority is necessarily implied. In addition, if the initial decision is not appealed and if the Administrator does not otherwise elect to review it, it automatically becomes the final decision of the Agency. 40 CFR §124.89(b) (1980). In short it is clear that the presiding officer is empowered to make decisions for the Agency. Therefore as part of the decisionmaking unit of the Agency, the presiding officer unlike a reviewing court is free to substitute his judgment for that of the permit issuer where the facts and circumstances warrant it. The principal limitation on his authority is the requirement that his decision be based solely on the facts appearing of record in the proceeding.

In the Matter of National Pollutant Discharge Elimination System Permit for Louisville Gas & Electric Company Trimble County Power Plant, 1 EAD 687 EPA App LEXIS8 *10 11 (EPA App 1981).

Here the hearing officer deemed the Second Tentative Determination on BTA, in effect, the "law of the case," and safeguarded it from challenge in the permitting hearing when the very point of the hearing was to test whether the tentative BTA determination should be adopted or rejected. This conduct violated the letter and spirit of the CWA and rendered the proceeding invalid.

C. Plaintiff established unreasonable pollution.

Where the legislature has created a statutory and regulatory scheme that specifically governs the proposed conduct the question is whether it is unreasonable must be evaluated through the lens of that entire statutory scheme. City of Waterbury v. Town of Washington, 260 Conn. 506, 549 (2002). To demonstrate that the proposed activity – here, continuation of once-through cooling with modest technical fixes that do not approach the performance standard of closed cycle cooling – will cause unreasonable pollution requires a showing that it does not comply with the applicable statutory standards.

The record here unequivocally shows that DEP and Dominion – not to mention EPA - are in agreement that closed cycle cooling is the superior vehicle to minimize adverse environmental impact. However, DEP, in cooperation with Dominion, assured that the hearing and permitting process would not entertain the notion of closed cycle cooling. As a consequence, the proceedings ensured that the CWA would be violated.

As stated in the 2010 permit BTA "determination" itself, the applicant, Dominion, itself presented evidence that closed cooling was BTA. Furthermore, Dominion's reports established that closed cooling was feasible at Millstone. For a period of close to 50

years, since Millstone Unit 1 went online in 1970, Millstone's owners and operators have exploited a public resource, the Long Island Sound, at no cost to themselves and at great detriment to the Sound, its marinelife and ecosystem. If the billions of fish destroyed in Millstone's once-through cooling system had been allowed to grow to maturity and been captured sold at the fish market, their collective value would be in the billions of dollars (based on per-pound retail prices for fresh-caught fish fillets). Their value to the marine ecosystem is incalculable. It is not necessary for Millstone to release 2.75 million gallons of hot water every day to an overheating Sound when the water can be recycled onsite, as it is at more than 42 out of 104 nuclear power plants in the United States. Closed-cycle cooling is a mature, tested technology for nuclear power plants. It is feasible and it is prudent and – under all the present facts and circumstances – legally required.

It is past time for an environmental reckoning at Millstone. For more than ten years, DEP countenanced greater water usage and release of harmful chemicals beyond what was allowed in the 1992 permit under the guise of "emergency authorizations." DEP knew the EAs and their automatic renewals were illegal. Under all the facts and circumstances revealed at the administrative hearing, it is manifest that Millstone's 50-year experiment with once-through cooling has been an environmental catastrophe for marinelife. As Millstone Units 2 and 3 may obtain extensions to operate for many more decades, trillions of gallons of water essential to the marine environment may yet be subject to pollution and overheating, with continuing devastation to the marinelife. Forty-two other nuclear power plants in the U.S. operate with closed cooling systems and thereby avoid such environmental abuses: Why not Millstone?

D. The plaintiff established that the permit proceedings were legally flawed and fundamentally unfair and a product of prejudgment; therefore the administrative appeal should be sustained and the permit vacated and nullified.

As has been fully documented herein, when the hearing officer declared that closed cooling would not be evaluated under the BTA standard in the present proceedings, she revealed that the proceeding was prejudged.[78] When she ruled as inadmissible every single exhibit offered into evidence by the plaintiff, including the 1992 permit and the scientific reports of DEP's fisheries experts who attributed fish population collapses to Millstone entrainment and which Judge Moukawsher found so helpful, she revealed her prejudice, bias and prejudgment. When the hearing officer precluded plaintiff from presenting evidence to establish that "The application violates the federal Clean Water Act in that it fails to implement best available technology to avoid unnecessary adverse impacts as set forth in her Notice of Intervention," and other pertinent claims, she deprived plaintiff of the opportunity to act on rights available to her under CEPA.

The fundamental fairness the Supreme Court articulated as essential in administrative proceedings in FairwindCT v. Connecticut Siting Council, 283 Conn. 672, 690-91, was absent here.

E. Plaintiff established that the DEP procedures were inadequate for the protection of the rights recognized in the Connecticut Environmental Protection Act.

In Burton v. McCarthy, plaintiff asked the Superior Court to find that in this matter DEP's existing administrative and regulatory procedures were inadequate for the protection of the rights within the meaning of Conn. Gen. Stat. §22a-20.

[78] Early in the proceedings, plaintiff had requested her disqualification because of her ties to the nuclear industry; she denied the request.

Judge Moukawsher dismissed Burton v. McCarthy without making a specific determination of whether DEP's administrative and regulatory procedures were inadequate for the purpose stated or even referencing the statute..

Clearly DEP's procedures were inadequate.

The procedures employed by DEP in this matter deprived plaintiff of her rights as a §22a-19(a) intervenor: she could not raise critical issues germane to the proceeding.

The hearing officer, DEP and Dominion jointly sabotaged plaintiff's efforts to call attention to DEP's September 10, 2007 Draft BTA – defying the Supreme Court's order in Fish Unlimited - which called for closed cooling conversion.

The hearing officer precluded all of plaintiff's proffered exhibits, many of which, such as the 1992 report and the fisheries experts reports, were of compelling relevance.

The trial court committed reversible error in dismissing the case under these circumstances.

F. The trial court proceedings were inconsistent with the Supreme Court remand order.

As stated, in Burton v. McCarthy, the Supreme Court ordered the case remanded to the trial court under the following terms and conditions:

> **The only relief that is now available to the plaintiff is a determination by the trial court as to whether the permit renewal proceeding was inadequate because the department misinterpreted or misapplied the applicable environmental law and, if the hearing is determined to have been inadequate, an order of appropriate declaratory or equitable relief.**

The Supreme Court contemplated and ordered a two-step proceeding. The second step would not be necessary unless the trial court on remand determined that – at the conclusion of the first step – DEP's permit renewal proceeding was inadequate under

§22a-20. In that case, the parties would be spared the time and expense needed to devote to proceedings on the second step, including potentially engaging costly expert witnesses and preparing for their testimony.

The trial court departed from the Supreme Court's reasoned and sensible approach. The result was a confusion of issues, evidentiary standards, misunderstandings, and a scattershot approach to the proceedings to cover all the bases required for both steps.

As stated, plaintiff moved for mistrial to correct this situation. The motion was denied by the trial court.

Plaintiff seeks on appeal to correct the trial court's departure from the Supreme Court's remand order.

The plaintiff has established herein that the first step of the remand order has been satisfied definitively.

This matter should be remanded for further proceedings to carry out the objectives of step two of the remand order.

Conclusion and Statement of Relief Requested

As set forth hereinabove, the Decision is not supported by the facts nor the law. The decision should be reversed; the case of Burton v. DEP be sustained and the NPDES permit issued thereunder declared null and void; and the case of Burton v. McCarthy be sustained with orders to direct Dominion to convert Millstone to a closed cooling system without further delay.

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CERTIFICATION

6.10.20

This is to certify that the plaintiff-appellant's electronically submitted ~~Corrected~~ Brief and has been delivered electronically on ~~September 20, 2019~~ to the last-known email address of each counsel of record and *pro se* party for whom an email address has been provided and have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law in accordance with the provisions of Practice Book Section 67-2(g). This is to further certify that a copy of the plaintiff-appellant's Corrected Brief has been sent on ~~September 20, 2019~~ to each counsel of record and *pro se* party in compliance with Practice Book section 62-7, as set forth below, and to any trial judge who rendered a decision that is the subject matter of the appeal. This is to further certify that the plaintiff-appellants' brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically pursuant to Practice Book section 67-2(g). This is to further certify that the plaintiff-appellants' brief complies with all provisions of Section 67-2.

6.10.20

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